(1)

Supreme Court, U.S.
FILED

No. 03 - 03 46

JUL 30 2003

OFFICE OF THE CLERK

IN THE

Supreme Court of The United States

GLOBAL RELIEF FOUNDATION, INC.,

Petitioner,

v.

JOHN W. SNOW, *et al.*,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

THOMAS A. DURKIN
PATRICK BLEGEN
DURKIN & ROBERTS
THE MONADNOCK BUILDING
53 WEST JACKSON BOULEVARD
SUITE 615
CHICAGO, IL. 60604
(312) 922-8980
OF COUNSEL

ROGER C. SIMMONS
(COUNSEL OF RECORD)
VICTOR E. CRETELLA, III
PETER F. ASAAD
GORDON & SIMMONS, LLC
131 WEST PATRICK ST.
FREDERICK, MD 21701
(301) 662-9122
ATTORNEYS FOR PETITIONERS

GORDON & SIMMONS, LLC • (301)662-9122 • HTTP://WWW.GORDONSIMMONS.COM

41PP

QUESTIONS PRESENTED

1. Whether OFAC violated due process by designating GRF an SDGT based upon secret evidence and without affording GRF an opportunity to see OFAC's evidence, elicit sworn testimony, to confront and cross-examine OFAC's witnesses and to conduct oral argument in front of a neutral magistrate.

2. Whether foreign persons have an interest in GRF's property, such that OFAC was authorized to block GRF's property under IEEPA, simply because GRF provides humanitarian aid to foreign persons on foreign soil.

3. Whether the Executive Branch's use of IEEPA, to sanction a U.S. person for conduct which was legal when taken violates the Ex Post Facto and Bill of Attainder Clauses, and Fifth and Sixth Amendments.

PARTIES TO THE PROCEEDINGS

Petitioner, Global Relief Foundation, Inc., was the plaintiff in the District Court for the Northern District of Illinois and appellantin the Seventh Circuit.

Petitioner seeks to have this Court review the judgments entered below in favor of the following Respondents: Paul H. O'Neill in his official capacity as Secretary of Treasury and his successor, John W. Snow, Collin L. Powell in his official capacity as Secretary of State, John Ashcroft in his official capacity as Attorney General, R. Richard Newcomb in his official capacity as Director of the Office of Foreign Assets Control U.S. Department of Treasury, and Robert S. Mueller, III in his official capacity as Director of the Federal Bureau of Investigations. Respondents were appellees and defendants below. Respondents shall be referred to as "defendants" herein.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. THE HISTORY OF GRF 1

B. U.S. WAR ON TERRORISM 2

C. ENACTMENT OF U.S.A. PATRIOT ACT 2

D. OFAC'S ADMINISTRATIVE DECISIONS 3

E. SEVENTH CIRCUIT'S OPINION 7

REASONS FOR GRANTING THE WRIT 8

A. THIS CASE CONCERNS AN IMPORTANT FEDERAL QUESTIONS 8

B. THE SEVENTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AS WELL AS THE SUPREME COURT 11

1. THE SEVENTH CIRCUIT'S RULING DEFIES DUE PROCESS 11

2. THE SEVENTH CIRCUIT OVEREXTENDED IEEPA. 20

3. THE SEVENTH CIRCUIT'S DECISION SO FAR GLOSSES-OVER THE EX POST FACTO AND BILL OF ATTAINDER INQUIRY, THAT IT DEPARTS FROM THE ACCEPTED

AND APPROPRIATE COURSE
OF JUDICIAL PROCEEDINGS 25

CONCLUSION 28

CORPORATE DISCLOSURE STATEMENT 29

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

APPENDIX

A Global Relief Foundation, Inc. v. O'Neill,
315 F.3d 748 (7th Cir. 2002) ..... 1a – 10a

B Correction Order,
No. 02 C 2536 (7th Cir. January 24, 2003). 1b

C Global Relief Foundation, Inc. v. O'Neill,
207 F.Supp.2d 779 (N.D.Ill. 2002) . 1c – 61c

D Order Denying Emergency Petition
for a Writ of Mandamus,
No. 02 C 1874 (N.D.Ill. 2002) 1d

E Order Denying Emergency Motion
for Temporary Restraining Order and Preliminary Injunction
No. 02 C 1874 (N.D.Ill. 2002) 1e

F Global Relief Foundation, Inc. v. O'Neill,
205 F.Supp.2d 885 (N.D.Ill. 2002) ... 1f – 8f

G Treas. SDGT Designation
and "Findings of Fact" ..... 1g – 32g

H Order Denying Rehearing and Rehearing En Banc
No. 02 C 1874 (7th Cir. Apr 04, 2003). .. 1h

I U.S. Const. art. I. § 9, cl. 3; amends. V & VI; 1i

J 18 U.S.C. 2339B (2000) ..... 1j – 7j

K International Emergency Economic Powers Act,
50 U.S.C. §§ 1701-1707 (1977) .... 1k – 5k

L Exec. Order No. 13224,

66 FR 49079 (2001) ..... 1L – 6L

M United States Code of Federal Regulations,

Sections 501.807 ..... 1m – 2m

TABLE OF AUTHORITIES

American-Arab Anti-Discrimination Comm. v. Reno,
70 F.3d 1045 (9th Cir. 1995) 16,17,19,25
Art Institute v. Castle,
133 N.E.2d 748 (1956) 21
Austin *v. U.S.*,
509 U.S. 602 (1993) 18,19
Benevolence Intern. Foundation, Inc. v. Ashcroft,
200 F. Supp. 2d 935 (N.D. Ill. 2002) 6,10
Burrows v. Palmer,
125 N.E.2d 484 (1955). 21
Center for National Security Studies v. Department of Justice,
___ F.3d ___ 2003 WL 21382899 (D.C. Cir. 2003). 10
Communist Party of United States v. Subversive Activities
Control Bd., 367 U.S. 1 (1955). 18,25
Detroit Free Press v. Ashcroft,
195 F.Supp.2d 937 (E.D.Mich. 2002) 6
Draeger Shipping v. Crowley
55 F. Supp 906 (S.D.N.Y. 1944) 15
Dames & Moore v. Regan,
453 U.S. 654 (1981) 14,20,21,23
De Veau v. Braisted,
363 U.S. 144 (1960) 26
Doe v. Pataki,
120 F.3d 1263 (C.A.2 1997) 26
Evans v. Chicago,
2001 WL 1654769 (N.D.Ill.) 13
Fuentes v. Shevin,
407 U.S. 67 (1972) 15
Goldberg v. Kelly,

397 U.S. 254 (1970) 12,13,14

Hadad v. Ashcroft,

221 F. Supp. 2d 799 (E.D. Mich 2002) 10

Hamdi v. Rumsfeld,

316 F.3d 450 (4th Cir. 2003) 10

Hawker v. New York,

170 U.S. 189 (1898) 26

Healy v. James,

408 U.S. 169 (1972) 25

Holy Land Foundation for Relief and Development v. Ashcroft,

___ F.3d ___, 2003 WL 21414301 (D.C. Cir. 2003) 10

Hudson v. United States,

522 U.S. 93 (1997) 26

Houchins v. Koed, Inc.,

438 U.S. 1 (1978) 16

ICC v. Louisiana, & N.R. Co.,

227 U.S. 88 (1913) 14

In re Gault,

387 U.S. 1 (1967) 8

In re Oliver,

333 U.S. 257 (1948) 15

Jencks v. United States,

353 U.S. 657 (1957) 14,17

Joint Anti-Fascist Refugee Comm. v. McGrath,

341 U.S. 123 (1950) 15

Johnson v. Eisentrager,

339 U.S. 763 (1950) 19

Kansas v. Hendricks,

521 U.S. 346 (1997) 25,26

Kennedy v. Mendoza-Martinez,

372 U.S. 144 (1963). 17,18-19,26,27

Knauff v. Shaughnessy,

338 U.S. 537 15

Mathews v. Eldridge,

424 U.S. 319 (1976) 11

Miller v. United States,

78 U.S. 268 (1870) 14

Molerio v. FBI,

749 F.2d 815 (D.C. Cir. 1984) 19

National Council of Resistance of Iran v. Dept. of State,

251 F.3d 192 (D.C.Cir.2001). 17

Noble v. Board of Parole and Post-Prison Supervision,

964 P.2d 990 (Or. 1998). 15,17

Ohio Bell Tele v. Public Utilities Comm'n, Bowman,

301 U.S. 292 (1937) 13

Oregon v. Jackson,

36 P.3d 500 (Or. 2001) 15

People ex rel. Courtney v. Wilson,

63 N.E.2d 794 (1945) 15

Regan v. Wald,

468 U.S. 222 (1984) 14

Roviaro v. U.S.,

353 U.S. 53 (1957). 14,16,17

Smith v. Doe,

___ U.S. ___, 123 S.Ct. 1140 (2003) 27

Stoehr v. Wallace,

255 U.S. 239 (1921). 14

United States v. Burns,

683 F.2d 1056 (7th Cir. 1982) 15,17

United States v. Brown,

381 U.S. 437 (1965) 11,13

United States v. Johnson,

952 F.2d 565 (1st Cir. 1992) 17

U.S. v. One Assortment of 89 Firearms,

465 U.S. 354 (1984). 27

United States v. Robel,

389 U.S. 258 (1964) 18,25

United States v. Ward,

448 U.S. 242 (1980) 26,27

United States v. Yunis,

867 F.2d 617 (D.C. Cir. 1989) 17

Weaver v. Graham,

450 U.S. 24 (1981) 26

Youngstown Sheet & Tube Co. v. Sawyer,

343 U.S. 579 (1952) 18

Zadvydas v. Davis,

533 U.S. 678 (2001) 18

Statutes and Provisions.

U.S. Const. Art. I § 9 cl.3 1

U.S. Const. amend. V 17

U.S. Const. amend. VI 17

18 U.S.C § 2339B 1, 17

50 U.S.C. § 1701 ..... 1, 12

50 U.S.C. § 1702 ..... 1, 2, 15, 16, 17

50 U.S.C. § 1705 ..... 1, 17, 21

Executive Orders.

Executive Order 13224, 66 F.R. 49079 (2001) 1, 2

Other authorities.

31 C.F.R. § 515.701-05 1

31 C.F.R.§ 501.807 ..... 1, 14

The New McCarthyism: Repeating History in the War on Terrorism,

38 Harv. L. R. - C.L. L. Rev. 1, n.9 at 1, 3 (2003) 11

Miscellaneous

Blacks Law Dictionary 21

PETITION FOR A WRIT OF CERTIORARI

GLOBAL RELIEF FOUNDATION, INC., (hereinafter "GRF") Petitioners, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit (hereinafter the "Seventh Circuit").

OPINIONS BELOW

The Seventh Circuit's opinion affirming the district court's denial of GRF's motion for preliminary injunction is reported at Global Relief Foundation, Inc. v. O'Neill, 315 F.3d 748 (7th Cir. 2002)(App. A). The district court's opinion denying plaintiff's motion for preliminary injunction is reported at Global Relief Foundation, Inc. v. O'Neill, 207 F.Supp.2d 779 (N.D.Ill. 2002)(App. C). The district court's opinion denying GRF's emergency motion to preclude ex parte, in camera proceedings is reported at Global Relief Foundation, Inc. v. O'Neill, 205 F.Supp.2d 885 (N.D.Ill. 2002)(App. F).

JURISDICTION

The Seventh Circuit issued its opinion on December 31, 2003. App. A. It entered its order with respect to rehearing and rehearing en banc on April 4, 2003. App. H. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Reprinted in an appendix to this petition (App. I-M) are pertinent provisions of the United States Constitution, art. I. § 9, cl. 3, amends. V & VI; 18 U.S.C. § 2339B; the International Emergency Economic Powers Act, (hereinafter "IEEPA") 50 U.S.C. §§ 1701, 1702, and 1705; Executive Order 13224, 66 Fed.Reg. 49079; and 31 C.F.R. §§ 501.807, 515.701-05.

STATEMENT OF THE CASE

A. The History Of GRF.

GRF was incorporated in the State of Illinois on January 10, 1992, and established itself as a tax-exempt, non-profit organization pursuant to § 501(c)(3) of the U.S. Internal Revenue Code. Since its formation, GRF has maintained its principal office in Bridgeview, Illinois. GRF's mission has been to provide charitable relief throughout

the world. To serve this purpose, GRF has primarily received funds from Muslims in the United States and Europe.

With these charitable donations, GRF provided humanitarian aid in approximately 20 different nations and/or locales, focusing mostly on places with large Muslim populations. Its largest expenditures were for its food and Ramadan programs, with its other major programs focusing on providing health care and education to those in need as well as emergency relief in response to major catastrophes. In order to ensure that its humanitarian aid went to those in need, GRF physically supervised the distribution of its relief by maintaining field offices and dispatching field workers around the world. As of December 13, 2001, GRF was the second largest United States-based Islamic charitable organization (receiving $5,270,673 in contributions for 2001), and the largest such organization with respect to the geographic scope of its relief programs.

B. U.S. War On Terrorism.

In the wake of the September 11, 2001 terrorist attacks, many Islamic charities came under intense federal scrutiny because the government believed that they were funneling money to terrorists organizaitons such as al Qaeda and Hamas. To stop the flow of money, President Bush signed Executive Order 13224, 66 Fed.Reg. 49079, App. L, on September 23, 2001, declaring a national emergency with respect to international terrorism and invoking the powers delegated to him under IEEPA App., K. In the annex to that Order, the President announced a list of individuals and organizations he had determined were engaging in or supporting terrorism, and froze the assets of those persons. Among the 27 organizations targeted by the Executive Order were "three charitable or humanitarian organizations that operate as fronts for terrorist financing and support. . . ." GRF was not blocked pursuant to the September 23, 2001 Executive Order. In Executive Order 13224, President Bush also authorized the Secretary of State and the Secretary of Treasury to designate additional organizations and individuals for blocking if certain conditions were met. App. L § 1(c).

C. Enactment of U.S.A. PATRIOT ACT.

On or about October 26, 2001, the United States Congress passed Public Law 107-56 which was titled the "USA PATRIOT ACT". Among other things, the USA PATRIOT ACT amended 50 U.S.C. § 1702(a)(1)(B) to allow the President to "block [property] during the

pendency of an investigation". App. 2K. It also amended IEEPA to allow the Executive branch to use classified evidence to support blocking decisions. Id. 4K.

D. OFAC'S Administrative Decisions.

On December 14, 2001, the Department of Treasury's Office of Foreign Asset Control ("OFAC") implemented one of the newly enacted powers under the USA PATRIOT ACT by blocking GRF "pending investigation".[1] In support of this decision, OFAC prepared an internal memorandum explaining that there was a "reasonable belief that [GRF] will be found to meet one or more of the criteria of Executive Order 13224." OFAC kept the entire "record" pertaining to GRF secret.[2]

In furtherance of its investigation, government agents also raided GRF's offices in suburban Chicago. They seized most of the business records (approximately 500,000 documents) from GRF's headquarters, including GRF's promotional books, tapes, email, literature, religious texts, videos, video equipment machines, computers and the like. Though a search had been in the works since at least December 7, no warrant was provided to GRF. Judge Andersen revealed in his opinion below that the government conducted a warrantless search, invoking "emergency" procedures in an effort to legalize their acts after the fact. App., 18C-23C.

OFAC issued a "Blocking Notice" to GRF on the day of the raid, advising GRF that its entire operations, including all of its money and records, were blocked pending an investigation into the government's suspicions. In the Blocking Notice, OFAC advised GRF that if it believed the blocking action to be erroneous, it could "challenge it, [by sending a] letter setting forth GRF['s] views" to the Director of OFAC. However, neither the legal justification nor the factual basis for the "Blocking" were provided to GRF in the Blocking Notice, leaving GRF in the dark as to how to formulate its defenses. Although, GRF made

---

[1] At the time that OFAC blocked GRF pending investigation, President Bush had not delegated that power to the Treasury Department or any other person or entity by referencing it in an Executive Order. App. L. In fact, President Bush could not have delegated that power in E.O. 13224 because E.O. 13224 was implemented before Congress promulgated The USA PATRIOT ACT.

[2] The only notice of the charges received by GRF were vague accusations made by the Government to the media that GRF had some unspecified connections to al Qaeda and/or Hamas.

efforts to obtain notice of the charges from OFAC, GRF's efforts were unavailing.

GRF's defense was also impeded by the fact that it did not have access to its own documents which contained evidence of its innocence. Indeed, for weeks after December 14, defendants refused to acknowledge which agency had possession of GRF's documents. Finally, on January 4, 2002, a Treasury spokesman told GRF that it could not see its own documents unless GRF asked for, and Treasury granted, a license. After GRF applied for this license on January 4, Treasury backtracked by telling GRF that it would have to ask for the return of its documents from the FBI. Both the FBI and Treasury continued to refuse GRF access to its own documents.

Kept in the dark about OFAC's charges and deprived of the most likely source for exculpating evidence, GRF had little choice but to bring this action against the government. However, before it could pay its attorneys to do the work, GRF needed to obtain a license from OFAC. The undersigned obtained a license to accept payment from GRF for its legal fees on January 7, 2002. On January 28, 2002, GRF filed the complaint, sub judice, followed soon thereafter by a motion for preliminary injunction (February 12, 2002), seeking to enjoin the government from blocking GRF's money, documents and right to provide humanitarian relief.[3]

On March 8, 2002, defendants notified the trial court of their intention to hold an ex parte hearing and submit secret evidence (for the court's in camera review) in opposition to GRF's motion for preliminary injunction. GRF promptly objected to any and all ex parte or in camera proceedings for any purpose, and moved to enjoin OFAC from going forward with their proposed ex parte, in camera proceedings. Despite the opposition, Judge Andersen met with the government officials

---

[3]After seven months of combing through GRF's records, defendants (as explained supra at ii, respondents are referred to collectively herein as "defendants") have found no evidence of any wrongdoing by GRF. Of 450,000 items defendants claim are "pertinent", i.e., the materials the government asked for in OFAC's "Blocking Notice", none has ever been mentioned or relied on by OFAC or even included in the administrative record for consideration. To date, OFAC has continued to prohibit GRF from engaging in any humanitarian project, and it continues to bar United States persons from donating to GRF for such relief efforts.

regarding their secret evidence. This meeting was not recorded or transcribed in any way.

On March 27, 2002, OFAC declassified portions of four volumes of material, which they placed in the public record along with a "Statement of Material Facts" advanced as part of the evidence justifying their actions against GRF. The resulting factual record contained mostly unsworn comments, newspaper articles and innuendo comprised entirely of hearsay presented in a rambling format insulated from cross-examination. The Government's findings and so-called record were heavily redacted, leaving GRF uninformed of the full scope of the government's accusations. Much of the government's "record" was generated after December 14, 2002.

Although the administrative record produced to GRF was incomplete, the government did explain its rationale for blocking GRF. OFAC's director, Richard Newcomb asserted that OFAC could not allow GRF to continue as a functioning organization because, if GRF were allowed to operate, Treasury could not "monitor" its activities.

> [B]lockings are designed to swiftly immobilize funds and other types of assets that OFAC has a reasonable basis to believe **could be used** to finance activity posing a threat to U.S. interests. . . . If OFAC were compelled to unblock [GRF's] assets without placing strict conditions on the unblocking, such as those contained in OFAC License No. SDGT-45 (Exhibit 11) relating to certain GRF activities, it would lose the ability to monitor them and prevent their **possible use** in the orchestration, assistance or support of global terrorist plots.

3-25-02 Newcomb Aff. (emphasis supplied).

On April 5, 2002, the district court issued a memorandum opinion and order, accepting the defendants' "allegations" that "extraordinary circumstances" warranted reliance on a secret record, and refusing to halt the judicial use of secret evidence or ex parte contacts.

App.F.[4] GRF noted its appeal to this ruling on April 10, 2002, and filed a petition for a writ of mandamus on the same date. On April 11, 2002, the Seventh Circuit denied GRF's petition for a writ of mandamus and dismissed its appeal as premature. App. D & E.

Although Judge Andersen did not compel disclosure of the secret evidence, he criticized the government for failing to give GRF access to its own documents. In fact, he said that it was "difficult, if not impossible, for [GRF] to respond . . . without [its own] documents", as well as procedurally unfair.[5] Tr. Hr'g (April 30, 2002)(J. Andersen). "I believe that [GRF] should have . . . whatever [it] feels necessary [in the form of its own documents] to respond to the motion [for summary judgment] and should not be operating under constraints." Tr. Hr'g (May 7, 2002)(J. Andersen). Although defendants claimed that national security implications authorized them to withhold GRF's documents from GRF, the government began copying some of GRF's records and returned them slowly to GRF starting in April, 2002. However, the documents were returned in a state of disarray which impeded GRF's ability to use them.

On May 29, 2002, defendants proposed to convert their temporary blocking "pending investigation" into a permanent designation of GRF as a "Specially Designated Global Terrorist" (an

---

[4]Judge Anderson's acceptance of the government's claims of national security stands in marked contrast to the rejection of these exact same claims in Detroit Free Press v. Ashcroft, 195 F.Supp.2d 937 (E.D.Mich.), reconsideration denied (2002) (Edmonds, J.) (considering and rejecting each of defendants' national security justifications for secret proceedings as baseless in connection with INS detention of the chairman of GRF's board of directors).

[5]In another case by an Islamic charity challenging an OFAC designation, Benevolence Intern. Foundation, Inc. v. Ashcroft, 200 F. Supp. 2d 935 (N.D. Ill. 2002), the Judge, upon learning that the government had not returned copies of documents seized from that charity on December 14, 2001, ordered the government to make them available to the charity:

> Why not? How can they possibly try to sue without any documents? . . . [Y]ou have their documents. If they need those documents to pursue their case, they do not have those. [H]ow are they supposed to rebut the government's case if they do not have the secret documents [either]? I mean, you know, they are being whipsawed on both ends of the spectrum.

"SDGT"). In support of this proposed measure, OFAC identified one new newspaper article. In opposition, GRF supplemented its preliminary injunction motion by asking Judge Andersen to enjoin the new SDGT designation proceedings. Over the ensuing five and one half months, defendants added a few additional hearsay materials and an unknown quantity of classified materials into the administrative record. During the same time frame, GRF requested the right to elicit sworn testimony, serve subpoenas, conduct cross-examination and to see the full record, and for access to an unbiased fact finder. Defendants denied GRF all of these rights.

Although Judge Andersen had previously called this "an extremely important case," with "substantial" worldwide interest, and acknowledged that GRF had raised "at least 18 constitutional questions," which were "significant" issues, Tr. Hr'g (April 30, 2002)(J. Andersen), he nevertheless denied GRF's motion for preliminary injunction. App. F. Thus, the district court accepted the claim that "extraordinary circumstances" warranted reliance on a secret record. GRF noted its appeal from this decision on June 11, 2002.

Eleven (11) days before the oral argument in front of the Seventh Circuit (October 18, 2002), OFAC formally designated GRF an SDGT. App. G. Defendants notified the Seventh Circuit of this action immediately, suggesting that OFAC's SDGT designation mooted the appeal, which according to the government, only sought to enjoin the blocking pending investigation and not the SDGT proceedings.

E. Seventh Circuit's Opinion.

On December 31, 2002, the Seventh Circuit (Judges Easterbrook, Coffey and Cudahy) issued their opinion, holding that GRF had preserved its challenge to the SDGT designation for the interlocutory appeal, but that the SDGT designation should not be enjoined. App. A. The Seventh Circuit remanded the case to Judge Andersen so he could review the propriety of the SDGT designation. App. 12A.

When issuing its opinion, the Court below made several confusing and inconsistent statements. For example, Judge Cudahy implied that GRF was not foreclosed from seeking a permanent injunction against OFAC's use of secret evidence.

> GRF's constitutional objections are of varying degrees of merit, but its procedural complaints seem of greatest weight, even though not weighty enough to support preliminary relief. These procedural objections may not have been fully formulated in the context of GRF's designation as an SDGT.

App.12A-13A (concurring opinion). On the other hand, the majority opinion implied that further challenge to OFAC's use of secret evidence was foreclosed. See Id. 12A ("Because we have dealt exclusively with legal contentions, our resolution of them is conclusive and not subject to reexamination in the district court when deciding whether GRF is entitled to a permanent injunction"). But see id. (Judge Cudahy noting that the Court's opinion only foreclosed further preliminary relief and even that conclusion may not be correct). The apparent tension between the statements made by Judges Cudahy and Easterbrook in the published opinion presents a tremendous potential for confusion below upon remand and in other cases relying upon the precedential value of the Seventh Circuit's opinion.

REASONS FOR GRANTING THE WRIT

A. This Case Concerns An Important Federal Questions

This case presents to the Court several issues of exceptional importance worthy of review under a writ of certiorari. First the Court is confronted with OFAC's decision to shatter the very foundation of our adversarial system of justice by denying an American corporation indispensable protection from tyranny guaranteed by the Due Process clause. Specifically, OFAC's use of secret evidence to snuff GRF out of existence is anathema to our adversary system, which is built upon the principle that "truth [can only] emerge from the confrontation of opposing versions and conflicting data"; In re Gault, 387 U.S. 1, 20-21, (1967). By ratifying OFAC's use of secret evidence and unleashing a secret police and tribunal on its own citizens, the Seventh Circuit has abandoned the core principle of our judicial system. Since the Seventh Circuit's decision dispenses with the very instruments of due process needed to maintain fairness and to ensure adequate and accurate findings, certiorari review is necessary to halt our plunge into a "Brave New World" where the recognized safeguard against governmental persecution, i.e. the fundamental right to a public trial, is simply a footnote in the history books. Clearly, the underlying proceedings so far

deviated from the accepted and usual course that the Court should exercise certiorari review in order to correct the problem.

Second, Certiorari review is appropriate here because the public is solicitously awaiting the final resolution of this case. In fact, leading journalists around our country have written, published or aired over a thousand stories about this "high profile" case, reporting that it concerns "the most basic constitutional issue: the right not to have your freedom constrained without being able to see the evidence that justifies it." Dale Dale Russakoff, N.J. Secrecy Rule Keeps Arab American in Jail and in the Dark, Wash. Post at A01. One bellwether publication warns:

> Maybe Global Relief does aid terrorists. Maybe it doesn't as the organization's lawyers insist. But by letting the government keep secret its evidence, the judges have rendered worthless the group's constitutional due process rights, including the right to contest these allegations. "If there is . . . evidence," the charity's lawyer said, "it's evidence I've never seen."
>
> . . .
>
> Few doubt that the leaders of some charities operating in the U.S. are funneling money to homicidal zealots abroad while staff members ladle soup to hungry Muslim families. But when the administration and the courts imperiously ignore the Constitution to protect against this possibility, they lay the legal groundwork for a nation in which, far-fetched as it sounds now, federal agents could shut down the United Way and, when the public ask[s] why, respond: "None of your business."

Rights and the New Reality, L.A. Times, January 5, 2003 at M4.

Accordingly, to the public at large, this case has the taint of injustice, and certiorari review is necessary to reaffirm the public's faith in our justice system as one which will protect cherished freedoms for all, including the U.S. Muslim community's right to contribute to charitable causes of its choice. Additionally, by approving OFAC's eradication of the Nation's largest Muslim charity without due process, the Seventh Circuit not only deprived Muslims in America of a

significant choice to which they can donate their funds, but instilled a fear in the Muslim community that they are being persecuted for their religious beliefs.

Third, it would be advantageous for the court to review the legality of defendants' secret evidence because this issue has wider applicability than for just this case. See Holy Land Foundation for Relief and Development v. Ashcroft, ___ F.3d ___, 2003 WL 21414301 (D.C. Cir. 2003) (authorizing use of secret evidence to designate an Islamic charity an SDGT under IEEPA); Benevolence International Foundation, Inc. v. Ashcroft, 200 F. Supp. 2d 935 (N.D. Ill. 2002)(staying Islamic charity's civil challenge to SDGT designation due to criminal charge). In fact, since September 11, 2001, numerous courts have published opinions establishing procedural boundaries to the government's war on terrorism. Of these "war on terrorism" cases, this one is particularly consequential because it concerns a catastrophic deprivation of a U.S. person's vital interest. Accordingly, this court should grant certiorari in order to consider how to delineate the outer limits of the government's authority under IEEPA, which is a matter that has not been, but should be, decided by this Court.[6]

Adding to the momentousness of this case is the fact that it concerns a matter vital to the safety and welfare of the people, i.e. the government's war on terrorism. Nevertheless, it is inappropriate for the President to exploit popular sympathies, which might favor imperious displays of power in the aftermath of September 11, in order to expand

---

[6]Since Dames & Moore was decided, Congress has expanded the President's power under IEEPA, e.g. by authorizing the use of secret evidence to support an SDGT designation. The constitutionality of these new powers has never before been addressed by this Court even though similar provisions have been applied other statutory schemes. See infra n.13 (discussing secret evidence under AEDPA). Clearly, then GRF's secret evidence issue is in a posture favorable for certiorari review. Compare, this case, Holy Land Foundation for Relief and Development, ___ F.3d ___, 2003 WL 21414301 and Benevolence International Foundation, 200 F. Supp.2d 935 (2002) with e.g. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (denial of claim brought by enemy combatant captured in foreign war zone challenging to detention); Center for National Security Studies v. Department of Justice, ___ F.3d ___ 2003 WL 21382899 (D.C. Cir. 2003) (denial of claim brought by public interest group to obtain information regarding persons detained in wake of terrorist attack); Hadad v. Ashcroft, 221 F. Supp. 2d 799 (E.D. Mich 2002) (holding that deportation hearing was open to public). Furthermore, if this Court does not accept certiorari now, it is quite possible that GRF will be unable to reassert these arguments after remand because GRF is on the brink of total insolvency.

the national security privilege and peacetime emergency powers of the President at the expense of our core liberties. "Nothing is more common than for free people, in times of heat and violence, to gratify momentary passions, by letting in to the government principles and precedents which afterwards prove fatal to themselves." United States v. Brown, 381 U.S. 437, 444 (1965) (quoting Alexander Hamilton); David Cole, The New McCarthyism: Repeating History in the War on Terrorism, 38 Harv. L. R. - C.L. L. Rev. 1 at 3 (2003) ("in times of fear, government often looks for ways to engage in prevention without being subject to the rigors of the criminal process", but such "responses are virtually always considered mistakes"). Therefore, it is imperative that the Court grant certiorari in this matter in order to define the scope of the Executive's "national security" privilege while balancing the fundamental rights of U.S. citizens.

B. The Seventh Circuit's Opinion Conflicts with Decisions of Other Circuits as Well as The Supreme Court.

1. The Seventh Circuit's Ruling Defies Due Process.

The Seventh Circuit's ruling that OFAC complied with due process when designating GRF an SDGT is contradicted by case law from other Circuits and the Supreme Court. Under that law, Courts are required to evaluate the adequacy of procedural protections through the "consideration of three distinct factors":

> (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedural procedures would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). However, when the Seventh Circuit ratified OFAC's procedures, it simply determined that OFAC's use of secret evidence without an adversary proceeding was consistent with the preservation of national security and human life without attempting to balance these governmental interests against GRF's rights or the risk of erroneous decision. App.10A-11A.

Although the Seventh Circuit's observation may have been correct–national security may best be preserved through Gestapo tactics–the Seventh Circuit's failure to consider the ramification of these procedures on GRF's rights and the interests of the Muslim community was fatal.[7] In fact, if the Seventh Circuit had balanced all three Matthews factors it could have only come to one conclusion: the death sentence imposed upon GRF by OFAC with secret evidence was a miscarriage of justice.

First, GRF was entitled to extraordinary procedural protections because the SDGT designation had grave consequences for it. Not only did OFAC block all of GRF's accounts and property and stigmatize it throughout the world, but it deprived GRF of all ability to (1) do charitable work; (2) solicit donations; (3) associate with people; and (4) maintain its records. Since OFAC's designation of GRF as the "enemy" extinguished GRF's most precious rights and imperiled countless persons in need of GRF's aid, OFAC was obligated to temper its devastating and ruinous designation by offering GRF the full panoply of due process rights. Goldberg v. Kelly, 397 U.S. 254, 263-271 (1970)(level of due process is highest when deprivation "may deprive [person] of very means by which to live . . ."). However, OFAC violated its constitutional obligations by failing to grant GRF procedural protections commensurate with the level of the deprivation.

To start, OFAC should have given GRF full notice of the facts underlying the government's accusations.

> [W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact finding, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or

---

[7]Since the Seventh Circuit focused only on the government's interests, without even considering GRF's countervailing interests, it is clear that it relied upon the wrong rule of law to support its decision.

> persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. . .

Goldberg, 397 U.S. at 270; Ohio Bell Tele v. Public Utilities Comm'n, Bowman, 301 U.S. 292, 303-04 (1937) ("a hearing is not judicial . . . unless the evidence can be known").

Here, OFAC's notice was not meaningful because it left GRF in the dark about which transactions were being scrutinized by the government, when and where they took place and who was involved. Since GRF participated in numerous transactions with many persons from many countries, it was impossible for GRF to speculate which transaction(s) it needed to defend. Quite simply, OFAC imposed on GRF the impossible and monumental tasks of either guessing the source and nature of the government's secret suspicions or proving the legality of each donation, each charitable expense paid, and each wage paid regardless of whether OFAC challenged a specific transaction.

Furthermore, the government did not ameliorate its due process violation when it declassified portions of the "administrative record" because OFAC continued to rely on secret evidence therein. App. G (whole pages of evidence are missing). With respect to the evidence that was disclosed in the administrative record, it was "unintelligible" with "so many twists and turns that the reader ends up completely discombobulated." Evans v. Chicago, 2001 WL 1654769 *2 (N.D.Ill.) (applying Fed. R. Civ. Proc. 8 to dismiss complaint because the Complaint "offered a story filled with disjointed allegations"). Accordingly, OFAC's administrative record failed to satisfy the principles associated with notice pleading requirements of the Federal Rules of Civil Procedure. Although OFAC was not explicitly obligated to comply with the Rules of Civil Procedure when notifying GRF of its accusations, OFAC nevertheless should have adhered to a close facsimile of those principles when designating GRF since the gravity of its charges warranted extraordinary protections akin to those found in judicial proceedings instead of the inconsequential procedures actually utilized.

Defendants also should have afforded GRF a full opportunity to challenge the government's accusations in a hearing. Oral hearings are indispensable when credibility and veracity are at issue as they are here. Goldberg, 397 U.S. at 269 ("written submissions do not afford the

flexibility of oral presentations" and fail to fully protect a person's interests); Additionally, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." E.g. Goldberg, 347 U.S. at 269; ICC v. Louisiana, & N.R. Co., 227 U.S. 88, 93-94 (1913); This includes the right to confront and cross-examine confidential informants "[w]here disclosure of an informant's identity, or of the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause". Roviaro v. United States, 353 U.S. 53, 60-61 (1957); cf. Jencks v. United States, 353 U.S. 657 (government must reveal exculpatory evidence).

Defendants breached their constitutional obligations here by failing to provide GRF any opportunity to challenge OFAC's evidence in a hearing. Indeed, under OFAC's regulations it had no obligation to even provide GRF with a hearing.[8]

> [a] blocked person seeking unblocking . . . may request a meeting with OFAC; however, such meetings are not required, and the office may, at its discretion, decline to conduct such meetings prior to completing a review pursuant to this section.

31 C.F.R. § 501.807(c) (App. M)(emphasis added). Furthermore, OFAC improperly denied GRF any right to confront or cross-examine OFAC's witnesses (including informants) or see OFAC's evidence.[9]

---

[8]When defending this suit, defendants argued that they had no obligation to hold a hearing or make their witnesses available for confrontation and cross-examination because their regulations did not mandate such procedures. Commentators have criticized the use of these insubstantial procedural protections to sanction U.S. persons. Cole, supra n.9 at 1, 26, 27 ("IEEPA affords those designated . . . no opportunity to contest the designation" and "[I]t allows the President to selectively blacklist disfavored political groups without substantive standards or procedural safeguards).

[9]OFAC also should have given GRF an opportunity to challenge the SDGT designation in a jury trial. In essence, OFAC's designation of GRF as an SDGT was equivalent to labeling GRF the "enemy". Regan v. Wald, 468 U.S. 222, 225-228 (1984) (explaining that IEEPA is nothing more than a subset of the powers previously exercised by the President under the Trading With the Enemy Act ("TWEA")); Dames & Moore, 453 U.S. at 672-73. Since challenges to seizures on land of "enemy" property were tried to a jury at common law, Miller v. United States, 78 U.S. 268, 304 (1870), GRF had a right to a jury trial to challenge OFAC's designation of GRF as the enemy. U.S.

Accordingly, since OFAC's designation of GRF as an SDGT without a proper hearing, did not comply with due process, OFAC's SDGT designation, and the administrative record underlying it, was presumptively deficient.

Second, this presumption is reinforced by the fact that OFAC's secret evidence and obfuscatory proceedings produced a substantial likelihood of an erroneous determination.[10]

> The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English court of Star Chamber, and the French monarchy's lettre de Cachet. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial.

In re Oliver, 333 U.S. 257, 268-70 & n.23 (1948)(noting that secret evidence has never been used to convict a person of a crime); Fuentes v. Shevin, 407 U.S. 62, 81 (1972) ("It has long been recognized that fairness can rarely be obtained by secret, one-sided determinations of facts decisive of rights"); U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950)("[t]he plea that evidence of guilt must be secret is abhorrent to free [persons], because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.")(citation omitted);

Const. amend. VII; see also Stoehr v. Wallace, 255 U.S. 239, 246 (1921) (pronouncing a post-investigation blocking power "adequate" because it entitled a person to "full hearing on his claim" "unembarrassed" by the executive determination "in a court having power to enforce it if found meritorious"); Draeger Shipping v. Crowley, 55 F. Supp 906 (S.D.N.Y. 1944) (U.S. corporation was given trial before being designated "the enemy" and allowed to continue operations pending trial).

[10]Use of secret evidence is "not likely to inspire the confidence of a distrustful public." Oregon v. Jackson, 36 P.3d 500, 505 (Or. 2001); Noble v. Parole Bd., 964 P.2d 990, 995 (Or. 1998) (the "secret machinations of a Star Chamber" cannot be used to affix a badge of infamy); see also United States v. Burns, 683 F.2d 1056, 1058-59 (7th Cir. 1982)(the lack of a record describing an ex parte contact is per se prejudicial).

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170, (1951) (recognizing that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.") (Frankfurter, J., concurring). Clearly then, the Seventh Circuit could only rebut the presumption that GRF was entitled to confront its accusers in a jury trial if the Seventh Circuit identified a clear and paramount governmental interest.

However, the Seventh Circuit failed to identify a sufficiently important governmental interest which rebutted the presumption against secret evidence. In fact, it is a "firmly held main rule that a court may not dispose of the merits of a case on the basis of ex parte, in camera submissions" except in certain narrowly construed circumstances. American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1069 (9th Cir. 1995)("Only the most extraordinary circumstance could support one-sided process"). As explained below, the Seventh Circuit misstated the law to the extent it held that any of the exceptions authorized the use of secret evidence to impose an SDGT designation upon GRF.

To start, the Seventh Circuit improperly analogized IEEPA to FOIA when approving OFAC's use of secret evidence. Under FOIA, a court may utilize ex parte, in camera procedures to determine whether classified information can be withheld from a FOIA applicant. 5 U.S.C. § 552. However, the authority to use secret evidence under FOIA does not justify its use under IEEPA because a FOIA applicant does not have the same magnitude of property and liberty interests at stake as an SDGT designee. On the one hand, the FOIA applicant only has a privilege to access government documents based upon a Congressional discretionary decision to allow access. Houchins v. Koed, Inc., 438 U.S. 1, 15-16 (1978)(holding that an individual does not have a constitutional "right of access to government information"). Furthermore, the decision to withhold documents does not act as a permanent penalty or stigma upon the applicant. On the other hand, an SDGT designation deprives the designee of all its essential property and liberty interests and imposes a vile stigmatization which can last indefinitely if not forever. 50 U.S.C. §1701 (App. K)(allowing blocking to persist for duration of national emergency). Since the harm arising from an SDGT designation is significantly more severe than the denial of a FOIA application, Mathews requires that more procedural protections be afforded to a potential SDGT designee than for a FOIA applicant, making the Seventh

Circuit's FOIA cases inapposite here. E.g. Mathews, 424 U.S. at 335.

Similarly, the Seventh Circuit's reliance upon Rovario v. United States, 353 U.S. 53 (1957) to support the use of secret evidence under IEEPA was also misplaced. Under Rovario, the government was only authorized to use secret evidence to determine whether information about a confidential informant was privileged and not to dispose of the merits of a case. American-Arab Anti-Discrimination Comm., 70 F.3d at 1070. The privilege "must give way" to full disclosure if the information is relevant to the accused's defense or essential to a fair trial.[11] Roviaro, 353 U.S. at 61-62. Since OFAC used secret evidence to **convict** GRF of being an SDGT, and disclosure of this information was essential for a fair trial, OFAC's use of secret evidence was outside the scope of Rovario.

Additionally, the Seventh Circuit improperly relied upon the secret proceedings allowed by FISA to justify secret proceedings under IEEPA. Under FISA, the Attorney General may submit an application for surveillance to a FISA judge in camera and ex parte if the primary purpose of the surveillance is to gather foreign intelligence and not to conduct a criminal investigation. United States v. Johnson, 952 F.2d 565, 571-72 (1st Cir. 1992). However, if the surveillance turns up evidence of illegal conduct by the U.S. person, the government can only use that evidence to prove the U.S. person's guilt (or otherwise impose punishment) if the information is made available to the U.S. person. Id. at 571 ("government identified for [criminal defendant] the [FISA] tapes it intended to use at trial and made available to [defendants] all of the

---

[11]The Seventh Circuit improperly relied upon People's Mojahedin Organization of Iran v. United States Dep't. of State, 182 F.3d 17 (D.C. Cir. 1999) because the designee in that case was a foreign person without constitutional rights. Likewise, National Council of Resistance of Iran v. Department of State, 251 F.3d 192 (D.C. Cir. 2001)(hereinafter "NCRI") did not support the Seventh Circuit's decision. In that case, the D.C. Circuit suggested in dicta that a U.S. person could be deprived of its property under the Anti-Terrorism and Effective Death Penalty Act based upon secret evidence. However the case it relied upon did not support this dicta. Specifically, NCRI relied upon United States v. Yunis, 867 F.2d 617, 623-24 (D.C. Cir. 1989) which case reaffirmed the principle that information about a confidential informant may be privileged if irrelevant to a case. Since Yunis simply reaffirmed the principle that secret evidence can be used to determine whether a privilege existed and not to determine the merits of a case, NCRI wrongly relied upon it to authorize the permanent designation of terrorists under the AEDPA. Cf. United States v. Rahmani, 209 F. Supp.2d 1045 (C.D. cal. 2002) (holding that AEPPA was unconstitutional).

tapes in advance of trial"); cf. Jencks v. Untied States, 353 U.S. 657 (1957). The only time that secret evidence can be used against a U.S. person under FISA is if the U.S. person collaterally attacks the determination made by the Attorney General that probable cause existed to perform the original foreign intelligence surveillance. 50 U.S.C. §1806(e). Since the SDGT designation imposed by OFAC pursuant to IEEPA is not a collateral determination, but is a final adjudication of GRF's guilt,[12] which can persist indefinitely, the SDGT designation is completely distinguishable from a finding of probable cause under FISA such that FISA's authorization for secret evidence cannot justify its use under IEEPA.

Furthermore, the Seventh Circuit improperly relied upon national security as a universal exception to the prohibition against secret evidence. App. 10A-11A (stating Constitution would be suicide pact if it required disclosure of information helpful to the enemy). Although the Constitution is not a "suicide pact", the government cannot exercise absolute power by simply invoking national security considerations.[13]

---

[12]In fact, as explained in Kennedy v. Mendoza - Martinez, 372 U.S. 144, 165 (1963), branding someone an outlaw is an inherently criminal sanction.

> Dating back to the Magna Carta . . . it has been an abiding principle governing the lives of civilized men that no freeman shall be taken or imprisoned or disseised or outlawed or exiled without the judgment of his peers or by the law of the land. . . . [I]n keeping with this cherished tradition, punishment cannot be imposed without due process of law.

Since an SDGT designation does not convict property but is an in personam determination that GRF is an "outlaw", it can only be characterized as a criminal sanction limited by the 5th and 6th Amendments. Id. at 163-184 (holding that forfeiture of citizenship is inherently criminal); see also Austin v. United States, 509 U.S. 602 (1993)(majority and J. Scalia concurring opinions).

[13]See United States v. United States Dist. Ct., 407 U.S. 297, 320 (1972)(national security interests do not justify warrantless domestic security surveillance); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (national security is not a universal exception to Constitution); cf. Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1 (1955)(government could not designate an organization as a foreign power without having a hearing on the question of whether the organization was controlled by foreign power). Even the case relied upon by the Seventh Circuit for the proposition that the Constitution is not a "suicide pact", Kennedy, 372 U.S. at 165, held:

United States v. Robel, 389 U.S. 258, 263-64 (1967) ("even the war power does not remove constitutional limitations safeguarding liberties"). In fact, our nation is built upon the principle that we would rather see 100 guilty men go free than put one innocent man behind bars. Kennedy, 372 U.S. at 184. Accordingly, the Seventh Circuit improperly deviated from traditional due process principles when it justified the use of secret evidence based solely upon the government's interest in national security without factoring GRF's important rights into the equation.[14]

The Seventh Circuit also improperly relied upon Molerio v. FBI, 749 F.2d 815 (D.C. Cir. 1984), because that case did not authorize the government to deprive a U.S. person of all his property and liberty based on secret evidence. Instead, it only allowed the government to use secret evidence to dismiss a claim brought by a person who thought he was discriminated against when applying for a top secret FBI job. The use of secret evidence did not bar that person from seeking other

---

> It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessity for safe guarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history... Id. at 160 (it would be suicide to prohibit executive from power of conscription).

[14]That is not to say that secret evidence can never be used under IEEPA; it may be constitutional to freeze a non-resident alien who has no constitutional rights using secret evidence. See Johnson v. Eisentrager, 339 U.S. 763, 770-71 (1950). However, once GRF makes a prima facie case of being a U.S. person, e.g. Zadvydas v. Davis, 533 U.S. 678, 693 (2001)(noting that "due process clause applies to all 'persons' within the United States even aliens"); due process rights should flow therefrom. E.g. Kennedy v. Mendoza - Martinez, 372 U.S. 144, 165 (1963)("it has been an abiding principle governing the lives of civilized men that no freeman shall be taken or imprisoned or disseised or outlawed or exiled without the judgment of his peers or by the law of the land"); Cole, supra n.9 at 26-27 ("when IEEPA was used solely to impose [sanctions] on foreign countries, it was a relatively noncontroversial form of nation-to-nation diplomacy. But when that same authority is targeted not at countries, but at political organizations and individuals, it raises serious constitutional concerns."). Since the government cannot appropriate a U.S. person's property for use in negotiating the end of a national emergency caused by enemy aliens without giving that U.S. person due process protection, defendants violated due process by failing to offer GRF these procedures.

employment or otherwise holding property. Indeed, the "state secrets privilege" has never been used by the government as a "sword" to support punishment imposed against U.S. citizens but only to shield confidential information from disclosure. American-Arab Discrimination Comm., 70 F.3d at 1070. Since the Government here does not seek to simply shield state information from disclosure in the adjudication of a tort claim but, instead, as a sword to deprive GRF of its property and liberty, it is clear that the Seventh Circuit overextended the state secret doctrine.

2. The Seventh Circuit Overextended IEEPA.

The Seventh Circuit's opinion also conflicts with precedent from other Circuits, as well as this Court, to the extent it held that OFAC was authorized under IEEPA to block GRF's property. Under IEEPA, OFAC is only authorized to block property if a foreign person has an interest therein. 50 U.S.C. § 1702(a)(1)(B) (authorizing the President to "regulate . . . any . . . transfer . . . of . . . or transactions involving, any property in which any foreign country or a national thereof has any interest")(App. K). In fact, IEEPA confers no power over persons at all but rather only deals with power over property (namely foreign property) within the reach of the U.S. law. As explained by the Undersecretary (Enforcement) for the Treasury Department:

> [IEEPA] provides . . . authority to impose . . . sanctions against **foreign** terrorists. Essentially, IEEPA authorizes the President to act against **foreign** threats[.] **Since IEEPA applies specifically to foreign threats, the country or entities/ individuals targeted in the Executive Order are not subject to U.S. jurisdiction.** OFAC instead asserts jurisdiction over U.S. persons, reaching the property of the [foreign] targets [who are otherwise not reachable] by acting against their property [interests] in the U.S.

Hearing on Dismantling the Financial Infrastructure of Global Terrorism, Before the House Committee on Financial Services, 107th Cong. (2001)

This Court's opinion in Dames & Moore confirms that it is inappropriate to apply IEEPA to purely domestic assets. Although the Court concluded "IEEPA constitutes specific congressional authorization

to the President to nullify . . . attachments" on foreign-owned property, it held IEEPA did not empower the President to "suspend claims pending in American Courts" of U.S. persons:

> We conclude that although the IEEPA authorized the nullification of the attachments, it cannot be read to authorize the suspension of the claims. **The claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property.** An in personam lawsuit . . . does not focus on any particular property within the jurisdiction. **The terms of the IEEPA therefore do not authorize the President to suspend claims in American courts.**

Dames & Moore v Regan, 453 U.S. 654, 675 (emphasis added). The Court's holding is clear: IEEPA does not extend to property wholly owned by a U.S. citizen. Id.

Applied here, it is clear that OFAC improperly relied upon IEEPA and E.O. 13224 to block GRF's property because GRF's "assets" were wholly owned by GRF, which is a U.S. citizen. Indeed, the administrative record supporting OFAC's record fails to identify a single foreign person who has an interest in GRF's property. App. G. Nevertheless, the Seventh Circuit affirmed OFAC's SDGT designation based upon its observation that foreign persons had an interest in GRF because "GRF conduct[ed] its operations outside the United States". App. 6A-10A. The Seventh Circuit reasoned that GRF's overseas operations instilled in foreign persons an expectation that they might become beneficiaries of GRF's funds. Id. The Seventh Circuit went so far as to classify these foreign non-citizen's expectancies as "beneficial interests" in GRF. Id. However, the Seventh Circuit improperly held that GRF's operations overseas gave foreign persons an interest in GRF's property.[15]

---

[15]Clearly, the Seventh Circuit made a mistake by holding that "GRF reads the word 'interest' in § 1702(a)(1)(B) as referring [only] to a legal interest". App. A. (emphasis in original). In fact, GRF does not differentiate between legal and equitable interests because both are interests in property. Instead GRF has argued that IEEPA only applies to legally enforceable interests (as opposed to legal interests) because, by definition, a "property interest" must be legally enforceable. See infra at 22.

Illinois law holds that only the state attorney general has standing to enforce the terms of a charitable trust on behalf of hopeful aid recipients. Compare People ex rel. Courtney v. Wilson, 63 N.E.2d 794, 800 (1945)(holding that individuals cannot interfere in administration of public trust) and Art Institute v. Castle, 133 N.E.2d 748, 751-52 (1956) ("[t]he mere hope of [charitable aid] is so remote as to be inconsequential")) with Burrows v. Palmer, 125 N.E.2d 484, 486-87 (1955) (beneficiary of private trust is entitled to enforce trust in equity). In other words, potential foreign recipients who may wish to receive GRF's funds have no "right", "title" or standing to compel aid from GRF, and no "claim" if relief is not disbursed to them. Such an attenuated "expectancy" of future relief is not a property interest as that term is generally understood. Black's Law Dict. at 812 (explaining that "interest . . . denote[s] a right, claim, title, or legal share in something"); see also id. at 156 (defining "beneficial interest" as a "right to income or principal of trust funds"). Furthermore, even if GRF gave money to a terrorist in the past, that act would not give the terrorist an interest in GRF's remaining funds; it would only subject GRF to potential criminal liability, forfeiture of its funds under both federal and Illinois law, and injunctive relief. 18 U.S.C. § 2339B (App. J); 50 U.S.C. § 1705 (App. K). By exaggerating the meager hope of aid held by the countless refugees helped by GRF in the past to the level of a "beneficial interest", the Seventh Circuit generated the wildest of legal fictions out of a gossamer speculation to justify oppressive conduct.

To support its analysis, the Seventh Circuit also misconstrued GRF's arguments. Specifically, the Seventh Circuit held that GRF construed IEEPA as excluding from its jurisdiction any property owned by U.S. persons or corporations. App. 8A ("turn[ing] to GRF's contention that IEEPA does not apply to corporations that hold charters issued within the United States . . ."). Building upon this mischaracterization of GRF's claim, the Seventh Circuit reasoned that if property owned by a U.S. person was immune from IEEPA, the results could be untenable; the Seventh Circuit surmised that bin Laden would be free to give money with impunity to (a) an Illinois bank to be held in

---

Nevertheless, even under this broad construction of IEEPA, OFAC could not block a public trust like GRF's charitable funds based simply on the fact that a foreign person was a potential beneficiary; as explained below, a foreign beneficiary of a public trust does not have a legally enforceable interest, i.e. it is neither a legal nor an equitable property interest, and thus the expectation is not property.

trust for the benefit of al Qaeda or (b) a Delaware corporation formed and controlled by al Qaeda operatives. App. A (suggesting that the government's "ability to respond to an external threat [should not] be so easily defeated).

However, even under GRF's construction of IEEPA, OFAC could block a trust held by an Illinois bank for the benefit of al Qaeda, because al Qaeda's interest in the private trust as a beneficiary would amount to an interest in property. See supra at 21-22. Similarly, OFAC could effectively block all property of a U.S. corporation whose stock was held solely by a foreign entity such as al Qaeda by taking control of and directing the majority interest held by al Qaeda. 50 U.S.C. §1702(a)(1)(B) (authorizing OFAC to not only block property but "regulate" it). Accordingly, the United States would not be assailed by a parade of horribles if GRF's construction of IEEPA were adopted.

The Seventh Circuit also premised its "beneficiary" analysison the following:

> The [Supreme] Court observed [in Dames & Moore v. Regan, 453 U.S. 645 (1981)] that "claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property." GRF reads this as excluding any claims or other property owned by citizens of the United States. We read it, to the contrary, as focusing on the nature of the property rather than the identity of its owner. Claims against Iran not only were owned by U.S. citizens but also were designed to generate funds that would be used beneficially within the United States. Claims owned nominally by U.S. citizens but effectively controlled by Iran, or designed to raise funds for the operation of the Iranian government, would have been treated differently, we are confident.

App. 8A-9A (emphasis by Seventh Circuit). However, the Seventh Circuit's observation that IEEPA was triggered by the "nature" of the property, i.e. whether it benefitted a foreign person, was wrong. In fact, Dames & Moore made it perfectly clear that OFAC's jurisdiction to block property depended only on whether a foreign person had an

identifiable property interest in the claim and not whether the foreign person might benefit from the claim. For example, the Supreme Court noted that a claim held by a U.S. person against Iran could be blocked once the citizen's claim was reduced to judgment because the U.S. person would then have a lien, or property interest, in particular Iranian property. Dames & Moore,453 U.S. at 675 ("An in personam lawsuit, although it might eventually be executed upon, is an effort to establish liability and fix damages and does not focus on any particular property within the jurisdiction"). Since a lien against Iran's property could not in any way benefit Iran, it is clear that Dames & Moore did in fact focus on property interests, and not the nature of property, when defining the scope of IEEPA. Therefore, even if the Seventh Circuit was correct that OFAC could block a claim prosecuted by a U.S. bank on behalf of a trust for which Iran was the beneficiary, the Seventh Circuit's rationale for this conclusion was inaccurate. Quite simply, the proceeds of a private trust held by a U.S. bank for Iran could be blocked under IEEPA not because the nature of the property, i.e. because it benefitted Iran, but because Iran had a beneficial interest which amounted to a property interest. See supra at 21-22 This analysis is inapplicable to justify blocking the property of GRF's public trust in which only GRF, a U.S. citizen, has an interest. Clearly then, the Seventh Circuit misstated the law with respect to the scope of the Executive's blocking powers under IEEPA.[16]

The Seventh Circuit's construction of IEEPA is clearly overbroad. Under its construction of IEEPA, OFAC could freeze a U.S. citizen who bought illegal drugs because al Qaeda obtains funds to support its terrorism by selling illegal drugs in the U.S. In other words, the U.S. citizen could be frozen because his drug use "benefits" terrorists who have an expectation that he will continue to fund their crimes. Furthermore, it would allow OFAC to completely shut down any charity

---

[16]The Seventh Circuit's "beneficiary" analysis likewise fails to support OFAC's blocking of GRF's fundraising from U.S. persons. These solicitations are purely domestic transactions immune from IEEPA blocking because neither GRF nor U.S. persons are foreign nationals. Thus, the Seventh Circuit's determination is over-inclusive to the extent it found that all of GRF's activities were subject to blocking without applying IEEPA to GRF's property and liberty interests on a transaction by transaction basis. OFAC's blocking is also improper because it does not "deal with" a national emergency of foreign origin. In fact, OFAC has failed to identify a single piece of evidence establishing that terrorists have an interest in GRF's property.

including the Red Cross or United Way, which happened to give aid in terrorist hot spots. What makes this power subject to corruption is the fact that OFAC can make the decision to block based on political as opposed to evidentiary reasons. For example, both GRF and the Red Cross gave relief in Afghanistan during the U.S.'s actions against the Taliban, but only GRF was frozen. Clearly this bias against the Islamic charities created the appearance of religious persecution considering that the evidence of GRF's guilt is secret. Since the power to block under IEEPA is a political power and not a police power,[17] it should not be applied to punish U.S. persons because the results would do violence to the Constitution.[18]

---

[17]The allegations and innuendo advanced by OFAC to support its blocking leaves little doubt that GRF is being frozen for political reasons, and not because GRF committed a crime. The "facts" do not even recite a crime, even with generous innuendo. App. G. Individually or in conjunction, the following facts cited by defendants are incapable of supporting the inference that GRF participated in prohibited transactions with blocked terrorists or provided material support to terrorists generally: (1) the charity sent money to or conducted operations in Afghanistan; (2) the charity's tax filing lacked detail and the charity refused to let a reporter dig through its business records on demand; (3) a former director of the charity fled the country; (4) a former director of the charity attended a mosque that a terrorist also attended; and (5) the charity disseminated views of radical Islamic leaders. At best, these facts suggests that GRF is guilty of associating with the wrong people. This is insufficient to support punitive action. American-Arab Ani-discrimination Committee v. Reno, 70 F.3d 1045, 1063 (9th Cir. 1995) ("'Guilt by association alone' violates the First Amendment.") See also United States v. Robel, 389 U.S. 258, 265-266 (1967); Healy v. James, 408 U.S. 169, 186 (1972), (Government must establish knowing affiliation and a specific intent to direct and further illegal aims, not mere advocacy and association.) Communist Party v. Subversive Activities Board, 367 U.S.1, 82-83, 84-85, text and n. 33 (1961).

[18]Defendants criticize GRF's construction of the executive's power under IEEPA as being too "mechanistic" because GRF defines the term "property interest" using state law principles. Defendants argue that they should be able to define "property interests" as broadly as they like so they can have the freedom they need to protect this Country in times of national emergency. Id. However, as can be seen from GRF's hypotheticals, defendants' definition of property is overbroad, unworkable, and arbitrary. For example, under OFAC's construction of IEEPA, the U.S. could impose a sanction on Russia because its companies are providing Iraq with military hardware, including GPS blocking systems which were used by Iraq against the U.S. in the last war, and extend that blocking to all U.S. companies which sold technology to those Russian firms. In fact, the government could designate those U.S. companies for blocking despite the fact that (a) the U.S. companies did not know that its technology would be sent to Iraq; and (b) exporting the technology to Russia was legal when done. Despite the audacity of such a result, that is exactly what defendants ask this Court to do, i.e. affirm the designation of GRF as an SDGT based upon insinuations about conduct that was legal

3. **The Seventh Circuit's Decision So Far Glosses-Over the *Ex Post Facto* and bill of attainder Inquiry, That It Departs From The Accepted And Appropriate Course Of Judicial Proceedings.**

The Executive Branch's use of IEEPA, to sanction a U.S. person for conduct which was legal when taken violates the Ex Post Facto and Bill of Attainder Clauses, and Fifth and Sixth Amendments. The framework of such an inquiry is well established but was disregarded below. A Court "must ascertain whether the legislature meant the statute to establish 'civil' proceedings." Kansas v. Hendricks, 521 U.S. 346, 361 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, the court must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the legislature's] intention' to deem it 'civil.' " Id. (quoting United States v. Ward, 448 U.S. 242, 248-249 (1980)).

The first of the two part inquiry is whether the legislature intended IEEPA to establish a regulatory scheme that is civil and nonpunitive. The Seventh Circuit below merely declared that the intention of the legislature was nonpunitive based upon its belief that IEEPA "does not define a crime." App. 11a. In doing so, the Court made its determination with little consideration and analysis despite the importance of the inquiry.

If the Court had made the proper inquiry, it could only come to the conclusion that IEEPA was enacted to authorize the President to direct economic sanctions against foreign countries as punitive measures. Indeed, defendants admits that E.O. 13224 was enacted to impose "financial sanctions" on "those foreign persons that support or otherwise associate with . . . foreign terrorists." E.g. Gov't Br. at 28. See also E.O. 13224, (recitals). Since the purpose of E.O. 13224 was to impose punishment on foreign terrorists, GRF has shown by clear proof that the "purpose" and "effect" of E.O. 13224 was "punitive", implicating GRF's rights under the Ex Post Facto and Bill of Attainder Clauses, as well as the Fifth and Sixth Amendments.

---

when taken and unsupported by any finding of scienter. See Cole, supra n.9 at 6 (criticizing defendants' targeting of "material support" because it is overbroad).

The Seventh Circuit did not come to this conclusion because it failed to apply the seven factor test noted in Mendoza-Martinez, -Martinez, 372 U.S. at 168-169 (1963). The Mendoza factors are designed to help illuminate a nonpunitive regulatory statute as opposed to a punitive one and they have their earlier origins in cases under the Bill of Attainder and the Ex Post Facto Clauses. See Id. Those factors include the following:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose.

See Id. By failing to even acknowledge these factors, it is clear that the Seventh Circuit so far glossed over the inquiry as to depart from proper procedure.

The Seventh Circuit's bare statement that IEEPA does not define a crime, does not end the inquiry there. Under well established Supreme Court precedent, the court must probe the purpose and effect of the statute. Indeed, the Ex Post Facto Clause as part of our Constitution was meant to prevent "arbitrary and potentially vindictive legislation." See Weaver v. Graham, 450 U.S. 24, 29 (1981). Accordingly, the Seventh Circuit was required, but failed, to explore the arbitrary application of IEEPA to GRF's pre-Executive Order 13224 conduct.

Application of IEEPA by the government was unconstitutionally ex post facto. The statute at hand does much more than impose a mere regulatory function. Its point, after all, is to send a message that probably would not otherwise be heard. By "freezing" an entity that gives money and aid to "hot spots," the government is broadcasting a warning in its "war on terror." Designating a person as a terrorist, a statement that affects reputation, credibility and carries harsh consequences such as disassociation from community affairs. Thus, the purported regulatory function is punitive; for certainly it is doubtful that

IEEPA's consequential effects are "less harsh than the sanctions of occupational debarment" that this Court has upheld in Hudson v. United States, 522 U.S. 93 (1997), De Veau v. Braisted, 363 U.S. 144 (1960), and Hawker v. New York, 170 U.S. 189 (1898).

There are practical effects of being listed as a "Specially Designated Government Terrorist" in the eyes of the world. See, e.g., Doe v. Pataki, 120 F.3d 1263, 1279 (C.A.2 1997) (noting "numerous instances in which sex offenders have suffered harm in the aftermath of notification--ranging from public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson"). No doubt, the effects of violating IEEPA include profound humiliation and isolation as a result of the government's public declaration. The court below weighed none of these factors. The court below simply glossed over the crucial inquiry. Formal evidence of legislative intent does not justify requiring the "clearest proof" of penal substance in such a case. See Hudson, 522 U.S., at 113-114 (Souter, J., concurring in judgment). Thus, the mere fact that the statute "does not define a crime" is hardly dispositive.the Act involves imposition of an "affirmative disability or restraint." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

CONCLUSION

THEREFORE, Petitioner GLOBAL RELIEF FOUNDATION, INC., requests that this Court GRANT its Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Roger C. Simmons /ve/

Dated: July 3, 2003

Roger C. Simmons
Counsel of Record
Victor E. Cretella, III
Peter F. Asaad
Gordon & Simmons, LLC
131 West Patrick Street
P.O. Box 430
Frederick, Maryland 21705-0430

(301) 662-9122
Attorneys for Plaintiff

Thomas A. Durkin
Patrick Blegen
Durkin & Roberts
The Monadnock Building
53 West Jackson Boulevard
Suite 615
Chicago, Il. 60604
(312) 922-8980
Of Counsel

SUPREME COURT OF THE UNITED STATES
RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to U.S. Supreme Court Rule 29.6, Global Relief Foundation, Inc., by and through its undersigned attorneys, Gordon & Simmons, LLP, hereby certify that: Global Relief Foundation, Inc. is a domestic, non-profit corporation chartered and headquartered in Illinois having no parent or publicly held company that owns 10% or more of the corporation's stock.

Roger C. Simmons, Esq.

SUPREME COURT OF THE UNITED STATES
RULE 29.5 CERTIFICATE OF SERVICE

Pursuant to U.S. Supreme Court Rule 29.5, Roger C. Simmons, an attorney, hereby certifies that on July 3, 2003, he caused the foregoing Appeal Brief and Appendix, to be served by overnight mail, to:

Solicitor General of the United States
Room 5614
United States Department of Justice
950 Pennsylvania Avenue., N.W.
Washington, D.C. 20530-0001

John E. Smith
U.S. Department of Justice
Civil Division
Federal Programs Branch
901 E. St., N.W.
Room 922
Washington, D.C. 20530

Thomas P. Walsh
Assistant United States Attorney
U.S. Department of Justice
Dirksen Federal Building
219 South Dearborn Street
Fifth Floor
Chicago, Illinois 60604

Douglas Letter
H. Thomas Byron III
Attorneys, Appellate Staff
Civil Division, PHB Room 9106
U.S. Department of Justice
601 D Street, NW
Washington, DC 20530

Roger Simmons /vec/
Roger C. Simmons, Esq.